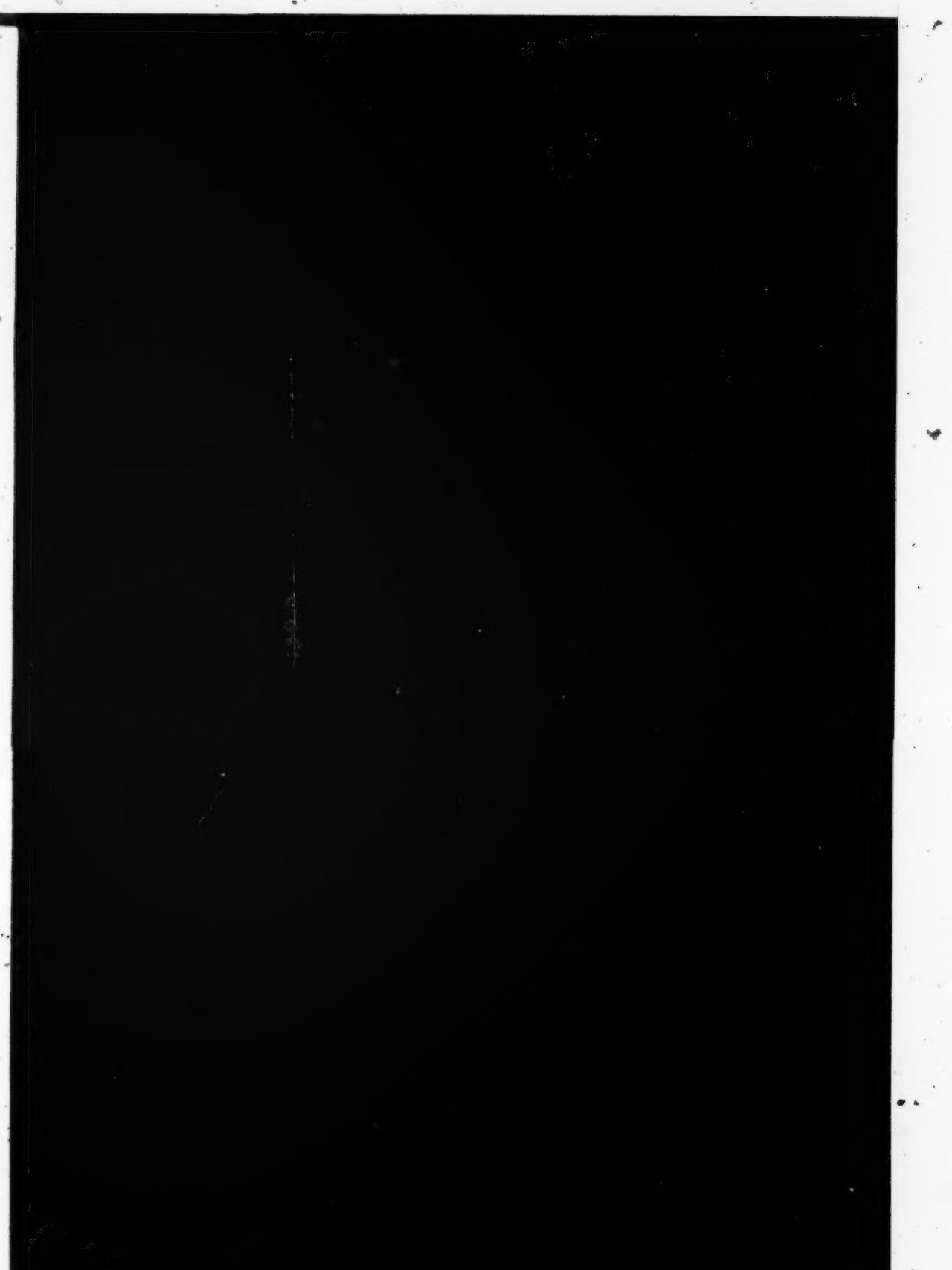

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IN THE

Supreme Court of the United States

October Term, 1966
No. 149

SANFORD E. ADAY, WALLACE DE ORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari, to the United States Court of Appeals for the Sixth Circuit.

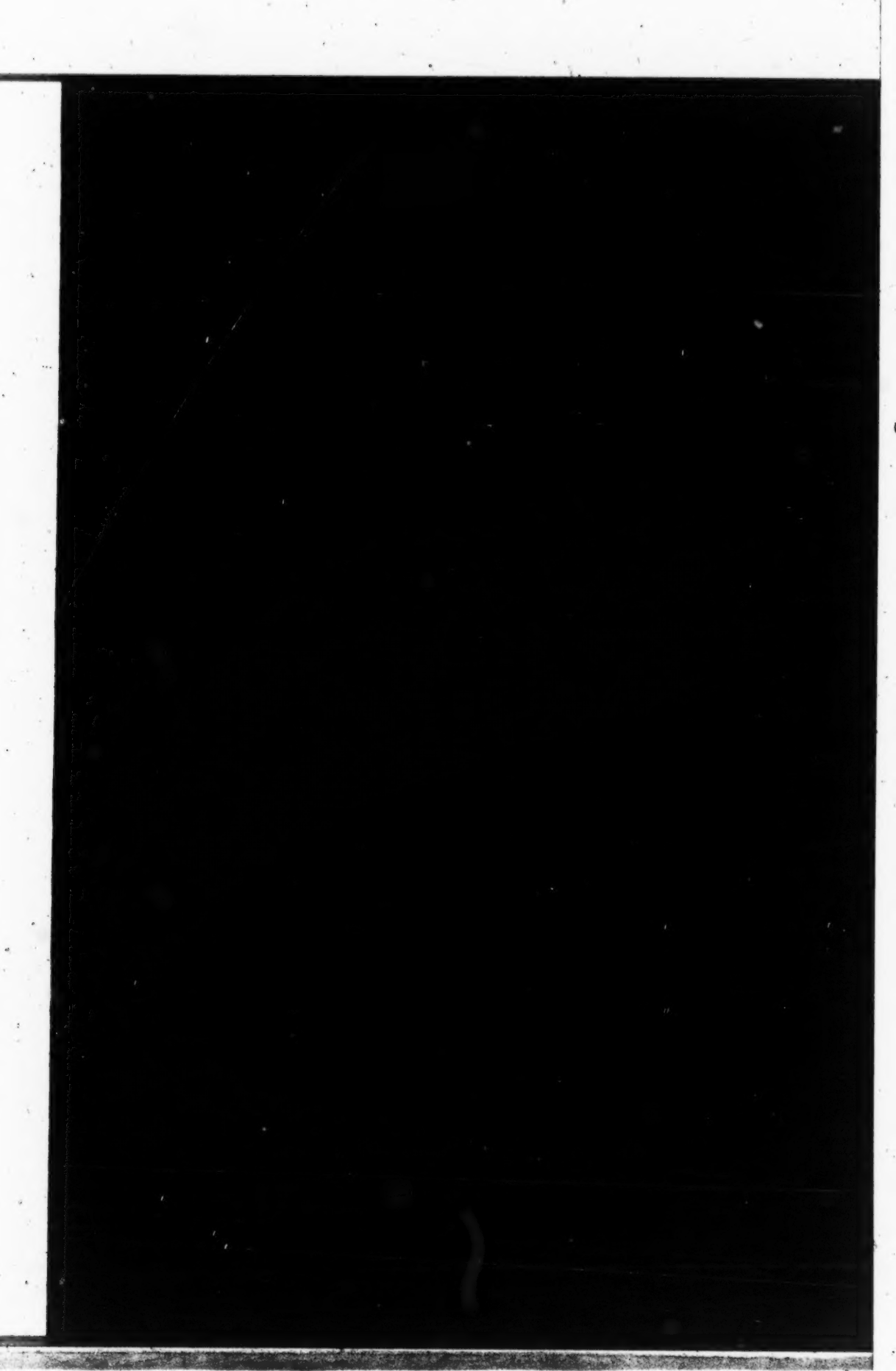
Motion for Leave to File an Appendix to Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondent.

Citizens for Decent Literature, Inc. (CDL), respectively requests leave of Court to file the Appendix herein, being a copy of Judge Kenneth Holland's trial court opinion, filed on November 4, 1966, in the Superior Court of the State of California for the County of Los Angeles in the case of People of the State of California v. David Zentner, Reuben Sturman, Will Kuenne and Tom Vail, S.C. No. 297456, to be attached as an appendix to the Brief Amicus Curiae of Citizens for Decent Literature, Inc., heretofore submitted to this Honorable Court for filing.

Judge Holland's opinion was not available for inclusion in said Brief at the time of printing, but was referred to therein at page 30 as an example of what is happening in trial courts in California under the so-called "three criteria test", alleged by petitioner Aday to have been propounded by this Court as a constitutional standard in obscenity prosecutions.

Respectfully submitted,

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
RAY T. DREHER,
Counsel for Citizens for Decent Literature, Inc.



APPENDIX.

Memorandum of Opinion Upon Granting Motion to Dismiss Indictment on Constitutional Grounds.*

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff, v. David Zentner, Reuben Sturman, Will Kuenne, and Tom-Vail, Defendants. No. 297 456.

On December 9, 1964, eleven persons, including the above-named four defendants were indicted by the Grand Jury of this County for the crime of conspiracy (182.1 Penal Code) to violate Section 311.2 Penal Code. The indictment with its recital of eight overt acts alleges that the defendants, in their various roles as authors, publishers or distributors, conspired to and did prepare, publish, and distribute to wholesale and retail outlets throughout the United States four obscene paperback books entitled "Lust in Leather," "Whipped Passions," "Perversion Resort," and "Club Unique," under the trade name "Boudoir Classics."

Four defendants have never been served with the warrant and are not before the court. The indictment as to the three other defendants has been dismissed pursuant to 995 Penal Code.

On the trial date, but before commencement of trial,[1] the four remaining defendants moved to dismiss the

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*Judge Holland's Memorandum of Opinion contains no footnotes. The footnotes which have been added are those of *Amicus* CDL, as comment on what we regard as the more glaring errors arising out of an application of the "three criteria test".

[1]California Penal Code Section 1238 provides that an appeal may be taken by the People: (1) from an order setting aside

(This footnote is continued on the next page)

indictment on the constitutional ground that the four books are not obscene as a matter of law.

In Zeitlin v. Arnebergh (1963) 59 Cal. 2d 901, a declaratory relief action, our Supreme Court held (p. 904) that the issue of obscenity is a question of "constitutional fact" that rests ultimately with the court. And on pages 910 and 911 the court apparently adopted Section 251.4 (4) of the Proposed Official Draft (1962) of the Model Penal Code proposed by the American Law Institute as the case law of this state. This Section reads in part: "The Court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene." After quoting this section this court states:

> "What we preserve in the present draft is *the independent judgment of the court on the question of obscenity* without impairing the defendants' right to a jury trial." (Emphasis added.)

This court as well as other trial courts on both the Superior and Municipal Court levels consider Zeitlin as mandate directed to all state trial courts to entertain pre-trial motions to dismiss such as is now before this court. A year later, June, 1964, the Supreme Court of the United States buttressed the Zeitlin doctrine in Jacobellis v. Ohio 378 U.S. 184, 12 Law Ed. 2d 793 by its statement (278 U.S. 188-190) that that court as well as all other courts cannot avoid making an in-

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the indictment . . . and (2) from a judgment for the defendant on a demurrer to the indictment. . . . The Los Angeles County District Attorney did not appeal Judge Holland's dismissal. *Cf.* American Law Institute Model Penal Code (1957 draft) Section 207.10. (3) The Statute of Limitations for the conspiracy-felony crime is three years. California Penal Code Section 800.

dependent constitutional judgment on the facts of the case on the issue of obscenity where the issue is raised.[2] The Zeitlin case is cited with approval in footnote 6.

Zeitlin, unfortunately, does not spell out any guide lines for trial courts to follow in ruling on these motions, particularly with respect to the question as to whether or not the court may receive in evidence and consider other published works and the volume of their circulation on the issue of contemporary standards of candor, and also of the methods of publication, distribution and advertising as tending to prove "pandering" which may now be considered by the court as probative evidence on the issue of obscenity, at least in close cases. (A book named "John Cleland's Memoirs of a Woman of Pleasure," v. Attorney General of the Commonwealth of Massachusetts, 383 U.S. 413, 16 Law Ed. 2d 1, hereafter called Fanny Hill; Mishkin v. State of New York, 383 U.S. 502, 16 Law Ed.2d 56; Ginzburg v. United States, 383 U.S. 463, 16 Law Ed.2d 37); these three cases were decided March 21, 1966; collectively they will hereafter be called "Ginzburg cases," and individually as Fanny Hill, Mishkin or Ginzburg.

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[2]We find no fault with the "independent constitutional judgment" concept propounded by members of this Court. However, if a trial judge is to be given the awesome power of bringing the trial of a pornographer to a screeching halt, should not this Court give the Nation some signal that the people also have an inherent right of appeal? An obscenity case is not like any other crime which affects only incidentally the community, for in such cases a standard is set which materially affects the entire community. In dismissing the matter without jury trial, is not Judge Holland saying that the community must accept *his* standards—which differs little from what this Court found wrong in the Postmaster censor cases—except that in the Postmaster situation, the pornographer at least had the right to have the matter decided by the highest court to whom he might choose to take his appeal.

Zeitlin, in adopting the hard-core pornography rule in California, holds that Tropic of Cancer by Henry Miller does not constitute hard-core pornography, (pp 904 and 922) basically because it is a serious literary work of social importance. In so holding the court could have considered no evidence but the book itself as there had been no trial. In Fanny Hill, as in Zeitlin, the Massachusetts court erroneously judged the obscenity of the book in the abstract except for some expert testimony and book reviews. The United States Supreme Court reversed, holding that the court should have considered the book in context with its commercial exploitation as prurient matter.

> "and the declaration of obscenity was neither aided or limited by a specific set of circumstances of production, sale, and publicity. All possible uses of the book must therefore be considered . . ." (Fanny Hill, 16 Law Ed. 2d p. 7.)

In the light of this new dimension of "pandering," as it may affect the determination of obscenity *vel non,* this court is of the opinion that in determining the constitutional issue of obscenity on a pre-trial motion it may not only compare[3] the four questioned books with other erotic publications that have been held constitutionally protected by decisions of the Supreme Court of this State and of the United States and other publications that have received wide public acceptance, but should further consider the circumstances of produc-

[3] The trial judge in applying his "deductive analysis" completely ignores a fundamental truth, *i.e.*, that the resolution of the obscenity issue is grounded upon the determinations of a "reasonable person"—a concept which anchors the law to reason and prevents error from reaching geometrical proportions.

tion, sale and publicity which might be conclusive in an otherwise close case.

Generally, the court in its discretion, may receive any kind of relevant evidence in hearing a motion. (34 Cal. Jur. 2d 514.) In criminal cases the court is required, outside the presence of the jury, to receive evidence on motions to suppress illegally obtained confessions and to suppress evidence obtained by illegal search and seizure. (See Zeitlin, 59 Cal. 2d at Page 909 and footnote 12, Page 910.) These likewise are questions of "constitutional fact."

A constitutional fact, says Justice Tobriner, speaking for the court in Zeitlin (p. 910), is a mixed question of law and fact, but that historical facts in obscenity cases which focus upon the material involved are rarely at issue. However, in footnote 13, p. 910, it is indicated that other elements required to make out a violation of 311.2 P.C., such as *scienter,* may depend on historical facts which may be at issue and require some proof.

Thus, the court seems to hold that when a historical fact is at issue the court may take evidence on a pretrial motion to dismiss. It would then follow that if the court rules against the people on conflicting evidence, the ruling is final to the same effect as similar rulings in coerced confession cases. If the court rules for the people, defendant is still entitled to a jury trial on that issue.

Having concluded that the court should consider certain evidence in addition to the four questioned books, evidence has been received, either by stipulation or without objection of any party bearing upon the cus-

tomary limits of candor, applying contemporary standards, in the description of nudity, sex and excretion (311 Penal Code). This evidence includes other erotic books openly available in the market place and in general circulation, together with their volume of sales, and in addition the circulation and volume of sales of other paperback books comparable to the four in issue.[4]

Also received in evidence and considered are other comparable books, offered by both the people and the defendants, which have been judged obscene or not obscene by other trial courts in California and in other states, including some cases in which the jury could not agree on the obscenity issue. Such evidence is relevant in resolving the contemporary standards of candor test. (In re Harris, 1961, 56 Cal. 2d 879.)

The court has further considered all of the evidence submitted to the grand jury not only for its general relevancy, but also for such probative value as the circumstances of production, sale and publicity of the books may possess on the ultimate question of obscenity.

Before evaluating the four questioned books it is helpful to place them in context with the entire national industry in the publication and distribution of

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[4]In obscenity trials (*a fortiori*, a pre-trial motion, as here) the overwhelming weight of authority supports the contrary proposition. *i.e.*, that similar materials appearing in trade are not admissible in evidence on community standards. See CDL Commentaries on the Law of Obscenity, Vol. 1, No. 3, page 3-45 *et seq.* This Court's restrictive rulings in prior restraint cases during the past eight years have made such materials available in vast quantities. See CDL Commentaries on the Law of Obscenity, Vol. 1, No. 2, pages 1-6 *et seq.* This fact coupled with the effect of Justice Harlan's innocent but misleading comment in *Smith v. California*, 361 U.S. 147, 171, has made this a major problem for law enforcement, for, under this theory and in this case, the smut peddler is able to pick himself up by his own bootstraps.

comparable paperback books as it existed prior to the Ginzburg cases. For brevity these books will be thereafter called "nightstand type" books, which is used in the generic sense rather than as the trade name "Nightstand Books" of the 59 books involved in A Quantity of Books v. Kansas (1964) 378 U.S. 205, the only case involving such books so far to reach the United States Supreme Court.[5] The court struck down the Kansas statute authorizing seizure of obscene materials prior to an adversary hearing on their obscenity, but did not rule on the question of obscenity. In a concurring opinion, however, Justice Stewart states he would reverse because the books are not hard-core pornography.[6]

The nightstand type books first appeared on the national scene about 1960[7] after the 1957 Roth-Alberts decision (354 U.S. 476) and after later United States Supreme Court decisions reversing convictions involving highly erotic matter. (See cases cited and discussed in Zeitlin, footnotes 21, 22 and 23.) They are published and nationally distributed openly through established commercial channels to wholesale and retain outlets.

In his well documented and scholarly book,[8] "Sex, Pornography and Justice" (1965) Albert B. Gerber of

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[5]See footnote 25 (*infra*).

[6]Judge Holland fails to mention that Justice Harlan (like Justice Stewart, a "hard-core" advocate, at least, in federal cases) and Justice Clark had views which differed from those of Justice Stewart.

[7]The reason for their appearance in 1960 is commented on in CDL Commentaries on the Law of Obscenity, Vol. 1, No. 2, pages 1-6 *et seq.*

[8]Professor G. Robert Blakey in 41 Notre Dame Lawyer 1055 takes a decidedly different view of defense attorney Al-

(This footnote is continued on the next page)

the Philadelphia Bar generally describes these books (pp. 259 and 286) and quotes 20 pages from one of them which he characterizes as the most "far out" (p. 260). This book, "Lover," is one of the 59 Nightstand Books seized in the Kansas case above cited. On page 286 he states that a score of publishers publish and distribute hundreds of such books designed solely to capitalize on the newly liberated sexual motif.

At the court's request, Franklin D. Laven of the Los Angeles Bar, counsel for defendant Zentner, and Herald P. Fahringer of the Buffalo, New York, Bar, counsel for defendant Sturman, both with extensive experience in the defense of obscenity cases, have submitted to the court in letter form information obtained from their various clients and other contacts in the publication and distribution field which they believe to be a fair and conservative estimate of the volume of national traffic in these books.[9]

In these two letters the names of a total of ten publishers are listed showing the number of "titles" (different books) printed by each publisher per month, the amount printed per title, and the total books printed per month. The ten publishers print from three to ten titles each, or a total of 73 titles per month. Total volume of all of the 73 different titles per month published is 3,120,000.

If these figures are correct, then there is published in the United States a grand total of over 37 million

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bert B. Gerber's 349-page book. Prof. Blakey's 8-page criticism of Gerber's work explodes most of the fallacies upon which Judge Holland based his opinion.

[9]See footnote 4. This is a crystal-clear example of a bootstrap defense.

nightstand type books per year with a retail value of over 25 million dollars.

These figures are not inconsistent with those above referred to in Mr. Gerber's book — and in fact appear more conservative.

Whatever the true volume of traffic in these books may be, from the study the court has made of this subject, one thing is clear and certain—the publication of these books is big business—and involves tens of millions of books and dollars annually.

Nightstand type books carefully follow a uniform format obviously designed and intended to keep just barely within the pale of obscenity statutes and appellate decisions.[10] They are, like most other cheap paperbacks, poorly printed, bound and edited. From about 150 to 200 pages in length, they are priced at fifty cents to one dollar. Titles are selected to effect an erotic impact, usually containing such words as sex, perversion, lesbian, passion, sin, lust, orgy, and the like.

Covers are decorated with full color art depicting semi-clad voluptuous females, and occasionally male figures in erotically suggestive attitudes or embraces, Some cover pictures vividly portray sado-masochistic themes.

Elsewhere on the front cover and sometimes on the back cover is to be found the inevitable "blurb," a short statement in heavy type of about 10 or more words clearly beckoning the shopper to the sexual adventures portrayed in the book.

If the prospective pubescent minded buyer (adult or juvenile) is not yet ready to take the bait he may turn

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[10]We are amazed that the trial judge is so insensitive to the volume of evidence to the contrary, which he thereafter recites so guilelessly in this opinion.

to the first fly leaf where he will find some particularly salacious tid-bit reprinted from the text which could well shoot down in flames any residual sales resistance.

The plots and character delineation of these novels are vestigial, the story line being barely long and strong enough to support the author's dirty linen—a staccato succession of erotic episodes involving both normal and aberrant sex acts of every form and hue. These multi-orgasmic scenes, often with several participants, are liberally laced with lurid descriptions of an endless variety of sexual stimuli—sadism, masochism, flagellation, bondage, torture, electrical devices, sex or fetish symbols, such as lace stockings and panties, high heel shoes, and often high heeled black leather boots, and gloves, girdles, corsets, and other garments of leather or rubber.

Preliminary sex play is described in some detail up to the moment when copulation, whatever its nature, begins. This consists of disrobing, fondling, petting, kissing and tonguing, particularly of the mouth and breasts. The actors are aroused to a high peak of lubricity, subjectively expressed verbally, and by moans, cries, and by sensuous physical contortions. At this point the camera lens is twisted out of focus and the picture becomes blurred. Actual sex acts are not described with any clinical detail or at all and are often merely implied or, at most, related. Neither clinical terms nor any of the usual four letter words are used to describe any sex act or genital organ. Euphemisms such as "he entered her," "she gave him what he wanted," or "they made love" denote copulation. "Temple of love," "mound of Venue," "manhood," and "member" describe genitalia, while "climax" or even less explicit terms

substitute for orgasm. A sexually unsophisticated pre-adolescent, one of today's rarities, would find himself at a complete loss to understand what the actors were doing to each other. All he would learn is that whatever they were doing was lots of fun.

The four books before the court conform to the night-stand format. No further description is needed except for the cover pictures and blurbs:

Lust in Leather. Cover picture shows a blond girl with hypertrophy of breasts and buttocks, wearing a tightly laced corset, lace panties and high leather boots. In her hand is a sword. In a stooping position before her is a male figure masked with the head of a bull.

Blurb:

"Lace, leather boots, lesbians, homosexuals, and love starved wives and husbands . . . all mixed into a devils orgy that rocked one of California's most exclusive country club communities."

Whipped Passions. Cover picture shows two young ladies of like physical endowments. One is dressed in a tight corset-girdle and black lace stockings. Squatting behind her, the other female is adorned only with a tight lace girdle. She holds a whip in her hand.

Blurb:

"Beautiful wicked wantons in high heeled leather boots practiced depraved rites for the entertainment of sex-jaded 'big shots.'"

Perversion Resort. Cover picture shows two mamose, calipygian females clad in brief garments which only slightly veil their charms. One is writhing on a low table to which she is bound. Blood streams from cuts

on her left breast and arm. The other stands over her in a whipping posture, but the whip is not shown.

Blurb:

"Leather loving lesbians sported with each other in a desert hot bed of bizarre tastes."

Club Unique. Cover picture shows female in foregound in high heeled black leather hip boots. A black tight garment covers part of her torso. Behind her another girl nearly nude is manacled in iron cuffs and chained to a wall. She has a bleeding cut on her thigh. In the blurred background are two female and one male figure almost nude.

Blurb:

"In this way out circle of Hollywood deviates, mere lesbianism was old fashioned! Leather quirts were their status symbol, and torture was the order of the day . . . and night."

In Quantity of Books v. Kansas, supra, Justice Harlan in his dissenting opinion, concurred in by Justice Clark, describes the 59 books there involved, including titles, covers, pictures and blurbs. "These inducements," he states (footnote 1), "are a fair indication of the actual contents of the book."

As to contents Justice Harlan in footnote 3 says:

"The essence of these books may be ascertained with great celerity, so replete are they with passages descriptive of sexual activities running the gamut from ordinary intercourse to (many deviate practices.) . . . they are so standardized that (an) estimate concerning the contents of absent books from an examination of the seven books before (the judge) would be almost as sure fire as a similar estimate of—unseen Mickey Mouse comic books based on a perusal of seven issues."

In the course of its study this court has read not only the four "Boudoir Classic" books at issue, but has read or scanned scores of other nightstand type books, published under other "imprints" or trade names such as "All Star Classics," "Brandon House," "Saber," "Intimate Editions," "Private Edition Books," "Satan Press," "Phantom Books," "Vega Books," "After Hours Books," "Sundown Reader," "Leisure Books," and "Pillar Books," as well as other "Boudoir Classics." All of them fit neatly within the dimensions of nightstand type books described herein. None of them, however, employs vulgar expressions or intimate clinical descriptions of sex activities as Justice Harlan seems to imply in his dissent.[11]

It is quite obvious now, however, that on March 21, 1966, when the Supreme Court affirmed Mishkin's conviction and sentence to three years in prison and a fine of $12,000 and that of Ginzburg to five years in prison, the tocsin was sounced loud and clear for the purveyors of pruriency, for since that time nightstand type books with their lurid cover pictures, titles, and blurbs have all but disappeared from the retail book racks. They are still to be found in abundance, though, disguised in acceptably decent and modest attire. Likewise, motion picture theaters have toned down their

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[11]The untrustworthiness of Judge Holland's "comparison" analysis is herein demonstrated. Judge Holland attempts to show that the material which he had before him did not compare with the material which Justice Harlan *described* in *Quantity of Books v. Kansas (but which books Judge Holland had not seen)*. Judge Holland "forgot" that the material which Justice Harlan was describing (Nightstand Book) was the same type of material which he, Judge Holland, was sitting in judgment upon. Judge Holland was too insensitive to note that Justice Harlan was describing the material which he, Judge Holland, had in his own hands.

provocative advertising of erotic films to a more acceptable level.[12]

In Fanny Hill (16 Law Ed.2d 5, 6) the Supreme Court restates its position as follows:

> "We defined obscenity in Roth in the following terms: 'Whether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

In the second paragraph following the above, the court states:

> "Each of the three constitutional criteria is to be applied independently;"

This definition is a close paraphrase of 311 Penal Code except that in the contemporary standards of candor test, prurient interest not only includes sex, but nudity and excretion, and must be morbid or shameful, and must go *substantially* beyond customary limits of candor. The California statute was construed in Zeitlin to proscribe only "hard core" pornography, formerly

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[12]We doubt that the observations which Judge Holland makes here are the proper subject of judicial notice. In fact, an investigation would reveal that the materials have not "disappeared" nor has the advertisements been "toned down".

thought to have been included in the Roth definition but which is now clearly rejected by the United States Supreme Court in Mishkin (16 Law Ed.2d 61), as "more stringent" than the Roth definition. Thus, some material could be found obscene under the now restated Roth definition but not obscene under California law.

In applying the three criteria to the nightstand type books no serious claim could possibly be made that the dominant theme of the material taken as a whole does not appeal to prurient interest. All of these books are carefully composed, titled and illustrated to appeal to a concupiscent audience.[13]

On the social importance test, no one would seriously claim the books possess literary, historical, social or educational value. Most appellate decisions classify these books as "trash" or worse (United States v. Klaw 350 Fed.2d 155, 160). Their entertainment value as is shown by their enormous circulation cannot be denied. Entertainment value alone, especially in the form of such venality as is offered by these books, cannot satisfy the social importance test.[14]

The contemporary standard of candor test is a different matter. Having failed the other two tests, to be branded as obscene under California law the books must *describe* the sex scenes in a shameful or morbid manner which goes *substantially* beyond customary limits of candor.

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[13], [14]In our view, having found that there was no redeeming social importance in the material, Judge Holland's review was concluded. For him to proceed further was a violation of Article I, Section 7 of the California Constitution, which accords to the People of the State of California the right to a jury trial in criminal cases.

The first point of reference in determining this standard is the United States Supreme Court decisions following Roth-Alberts in 1957, holding certain erotic material not obscene. Three of these cases are cited and the material described in Zeitlin (1963) 59 Cal.2d at Page 915. They involve a film describing the seduction of a 16-year-old boy by an older woman, a magazine directed to appeal of male homosexuals called "One, Inc.," and a nudist magazine called "Sunshine and Health." In 1959 the court held not obscene the motion picture version of Lady Chatterly's Lover, far less clinically descriptive than the novel by D. H. Lawrence but still erotic and based on a theme of condoned adultery Kingsley Int'l. Pictures v. Regents, 360 U.S. 684). The unexpurgated novel itself never reached the Supreme Court but was held not obscene by the Federal Circuit Court in Grove Press v. Christenberry (1960) 276 Fed.2d 433, 2d Circuit. In 1962 the Supreme Court held not obscene three illustrated magazines designed to appeal to male homosexuals called MANual, Trim and the Grecian Pictorial. (MANual v. Day, 360 U.S. 478.)[15]

This case and the One, Inc. case, supra, may now be impliedly overruled by Mishkin which holds that the prurient appeal test is satisfied if the material is designed to appeal to a clearly defined deviant sexual group.

In 1964 the Supreme Court held a French motion picture, called "Les Amants" (The Lovers) not obscene. A bored housewife dallies with various lovers and fi-

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15, 16, 17, 18We do not agree with the trial judge in his evaluation of the effect of these no-majority decisions. See the remarks of Professor Blakey in 41 Notre Dame Lawyer 1055, at page 1058.

nally falls in love with a young archeologist. The last scene depicts the lovers in bed obviously engaging in intercourse. This case holds that community standards of obscenity means the community standards of the entire nation as a whole.[16] It also holds that every court, including trial courts, must exercise its independent judgment on questions of constitutional fact in obscenity cases when raised. (Jacobellis v. Ohio, 378 U.S. 184.)

Also in 1964 the court held Henry Miller's "Tropic of Cancer" not obscene,[17] the same conclusion of the California Supreme Court in Zeitlin in 1963. (Grove Press v. Gerstein, 378 U.S. 577.)

The last Supreme Court case in 1964 was Tralins v. Gerstein, 378 U.S. 576, holding constitutionally protected[18] the book "Pleasure Was My Business," the story of the proprietress of a Miami brothel which describes in considerable detail the bizarre deviant practices of some of her customers of high social and community standing. Included are scenes involving sadism, masochism, flagellation, voyeurism, and exhibitionism.

In 1966 the court reversed the New York Court of Appeals which had held Fanny Hill obscene, but applying the new pandering rule, held it might be either fish or foul, depending upon whether its publisher had exploited it solely for its prurient interest.

After the convictions of Roth and Alberts were affirmed in 1957 the Anthony Comstocks took heart. But they failed to read between the lines. The court did not pass on the question of obscenity in those cases but formulated a new constitutional test for obscenity. The publishing industry, aware of the insatiable appe-

tite of the American public for erotica, correctly interpreted[19] Roth-Alberts as a limited license to exploit this vast untapped resource.

Fanny Hill, written over 200 years ago, was resurrected and published along with Chatterly's Lover and Tropic of Cancer, both written a generation ago. They were all sold in hard cover and paperback by the millions.

These books and the other erotic material withstood scrutiny of the Supreme Court because they successfully passed the pruriency-dominate theme test or the social importance test or both. These books describe sex scenes in intimate detail which include many deviant episodes. Four letter words and common vulgar expressions are strewn throughout most of them.

A great number of other books, some old and some new, which no publisher in his right mind[20] would have dreamed of openly publishing a few years ago are now published and openly sold in the millions of copies and are to be found listed in most public and university libraries. To mention but a few:

> My Life and Loves, by Frank Harris, the excellent autobiography of a distinguished author and critic. The first of the five volumes of this work written in the 1920's, intimately describes the numerous sexual adventures of his adolescence and early manhood.

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[19]We think this to be an "incorrect" evaluation of the majority opinion in Roth-Alberts, particularly in the light of this Court's majority opinion in Ginzburg. One would infer from the judge's statement that the people had really lost the Roth-Alberts case.

[20]With this one observation of the trial judge we are in complete agreement.

Candy, by Maxwell Kenton, regarded as an erotic spoof, a surrealistic Alice in Wonderland type of story in which a naive young girl becomes innocently involved in one sexual misadventure after another. Copies reported sold are over four million. In a letter dated June 23, 1965, addressed to the Citizens for Decent Literature in St. Louis, the Attorney General of the United States states his reasons for declining to prosecute under Federal Statutes.

Sexus, by Henry Miller (Grove Press), 634 pages, a novel similar in erotic content to his Tropic of Cancer, Tropic of Capricorn, Plexus and Nexus, describes at least 34 sexual scenes, one violent, all employing expressions of extreme vulgarity. Over a million copies have been sold. In a lengthy legal opinion of the Attorney General of the State of Utah, requested by the Law Observance and Enforcement Committee of the Church of Christ and Latter Day Saints, dated October, 1965, this book was held not obscene, the Attorney General refusing to take any action.

Nearly four million copies of Fanny Hill have been distributed.

Publication figures for other books of high but variable erotic content are:

Tropic of Cancer, 3,250,000
Tropic of Capricorn, 1,000,000
Last Exit to Brooklyn, 1,050,000

These books do not by any means exhaust the current field of scores of other controversial books of comparable erotic content possessing literary quality or so-

cial importance or both, all openly available in the market and in public and university libraries.

One last and final work deserves a special emphasis. This is a book containing an idiomatic translation from French to English of a few of the better known writings of the Marquis de Sade (1740-1814) published by Grove Press in hard cover in 1965 ($15.00) and in paper back in 1966 ($1.75, 752 pages).

This powerful writer, talented scholar, and rebel against the corruption of his times, left with his writings a deep impact on the world of literature, philosophy, history and psychiatry. His authentic portrayals of the sexually psychotic monsters in his writings are morbid and shocking almost beyond belief to anyone unacquainted with Kraft-Ebbing's Psychopathica Sexualis.

In this book, probably the first unbowlderized translation of any Sade's works published in this country are three novels, Philosophy of the Bedroom, Engenie de Franval, and Justine.

The first of these novels describes in minute sexual and scatological detail and in vilest language a succession of wild orgiastic scenes with both male and female actors who perform in pairs and groups every kind of copulation save normal intercourse. In the final scene the sex crazed group perform an unspeakable act of obscene torture upon an elderly woman.

Justine, who plays the title role in the third and best known novel is the prototype of Little Orphan Annie. She falls innocently into and escapes from the clutches of vicious sadists who find sexual relief only in a wide variety of horrifying tortures and murders.

This book now enjoys wide circulation and is available in book stores and campus libraries. To the per-

sonal knowledge of this court all books mentioned herein (exclusive of the nightstands) are listed in the library catalogues at the University of California at Los Angeles.

If all of these books, excluding de Sade, fairly represent contemporary standards, then by the many millions of copies publicly sold they have clearly established a customary limit of candor in the literary tastes of the American public which tolerates a very high degree of stark, raw realism in the description of sexual matters.[21]

If de Sade's book by wide public acceptance finds a secure place in our literature, and perhaps other similar imported works awaiting in the wings, then any residual limits of candor will have disappeared into outer space.

Counsel have submitted evidence and records of other obscenity cases in California disposed of at the trial level, all involving nightstand type books which is summarized as follows:[22]

1. Ballantyne v. Hogue, Superior Court, Tulare County No. 59666, a declaratory relief action involving three books, Orgy House, Passion Puppet, and The Lust Circuit. On November 24, 1964, Judge Wingrove held the books not obscene.

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[21]See footnote 4.

[22]Judge Holland is not the only California judge who has prevented pornographers from being brought to trial under the California statute. As mentioned in this opinion, California Judges Sprankle, Klein, Landis, Selber and Mast have also dismissed obscenity prosecutions *before trial*. We are familiar with the subject matter involved in those cases and can say in good conscience that there was no difference in the quality of the material ruled upon by these judges (where the issue was "probable cause") and that found to be obscene in the jury cases noted.

2. People v. Luros, Superior Court, Los Angeles County No. 295 183, a criminal conspiracy action, as in the present case, involving six books, Two Women in Love, Lesbian Captive, Lesbians in White, The Girls at Wendy's, Three Way Apartment and Honey Lips. On June 14, 1965, Judge Sprankle held the books not obscene and dismissed the action.

3. People v. Mills, Municipal Court, Los Angeles Judicial District No. 256 429, a misdemeanor prosecution involving one book entitled Borrow Her Tonight. On July 22, 1966, Judge Klein held the book not obscene and dismissed the action.

4. People v. Misuraca, Municipal Court, Los Cerritos Judicial District No. M 25081, a misdemeanor prosecution involving four books, The Naked Archer, Black is for Bliss, Sexpionage, and Fetish Farm. On August 1, 1966, Judge Landis dismissed the counts involving the first three books, holding they were not obscene. On the fourth count involving Fetish Farm, the jury disagreed. The case is now set for retrial.

5. People v. Schnepf, Superior Court, Los Angeles County No. 289 205, a criminal conspiracy action involving the following nine books, Wild Women of Wolf River, Girls in High Spike Heels, Route 69, Fanny Hill, Beds of Canyon Grove, Sin Island, Women of Beaver Mountain, Surburban Sexpots, and the Love Teacher. On February 23, 1965, Judge Selber held the first four books not obscene and ordered them stricken from the pleadings. On March 19, 1965, the jury returned a verdict of not guilty with respect to the other five books, but inexplicably, in a special verdict found the books to be obscene.

6. - People v. Haddad, Superior Court, Los Angeles County No. 273, 608, a criminal conspiracy action involving four books entitled, Sex Life of a Cop, Devil's Advocate (not to be confused with two excellent novels of the same name by Taylor Caldwell and Morris L. West), the Head Humpers, and Down She Goes. The defendants were found guilty after a jury trial, which was affirmed on appeal. The question of obscenity was not raised on appeal, but nevertheless was discussed in the unreported decision of the District Court of Appeal as to only one book, Devil's Advocate. The Court held that this book, without mentioning the others, was obscene. The Court has read this noisome book. It is the only unqualified specimen of hard core pornography that this Court has yet read. The defendants' operation was little more than bootleg smut peddling. The decision on the other books is not definitive.

7. People v. Mishey, Municipal Court, Santa Ana Judicial District, a misdemeanor prosecution involving two books called Three-And-A-Half Women and Madame Butch. On September 28, 1966, Judge Paul Mast dismissed the case holding the books were not obscene.

8. People v. Moscovitz, Municipal Court, Los Angeles Judicial District, a misdemeanor prosecution involving a book entitled Lust by Friends and Neighbors. Defendant was convicted after a jury trial, September 27, 1966.

9. United States v. Aday, United States District Court, Southern District of California, Northern Division, No. 3545ND, criminal, a four-count indictment involving the following 12 books, The Black Night, Rene, Stairways to Sin, Dark Quafters, The Rambling Maids, Tainted Wife, Violent Surrender, The Strange

Three, Karla, Turbulent Daughters and Taxi Dancers. Apparently all but three of these books were stricken as not obscene. In November, 1958, the jury returned a not guilty verdict as to the book, The Rambling Maids, but disagreed as to the other two, having voted nine to three for acquittal. Thereafter, February 6, 1959, Judge Yankwich dismissed the indictment.

It is interesting to note that in the Luros case following dismissal of the California case by Judge Sprankle, Luros and others were indicted under Federal obscenity statutes in the United States District Court, Northern District of Iowa, Western Division, No. 65-CR-3007-W, the 26-count indictment involving a number of books and magazines, four of which were the same books involved in the California prosecution. Some of the counts were dismissed but on the other counts the jury returned guilty verdicts.[28] Thereafter, on January 14 1966, defendants renewed and submitted their motion to dismiss on constitutional grounds, which motion to this day remains undecided.

In 1960, the above mentioned Aday was the defendant in another conspiracy prosecution involving a number of similar books, among which was one called Sex Life of A Cop, also known as 10:04 Sgt. Thorne, the same book as in the above Haddad case. This case reached the Supreme Court of California on a search and seizure question (55 Cal.2d 789). This case has never been brought to trial. Thereafter, in 1964 or 1965, Aday was prosecuted under Federal obscenity statutes in the United States District Court for the

[28]This result is not unusual. Where the matter is tried to a jury, the result is uniformly the same: Verdict guilty — subject matter obscene. See Bromberg, Five Tests For Obscenity, 41 Chicago Bar Record 416, 418 (1960); 40 Notre Dame Lawyer 1, 10 (1964).

Western District of Michigan, Southern Division, Criminal No. 66150A, in a 19-count indictment involving the following eight books: Witch Finder, The Black Night, Decisive Years, Sex Life of a Cop, Desperate Moments, Love Princess, I Am A Lesbian, and Never Enough. The jury was unable to agree that any of these books was obscene except Sex Life of a Cop on which defendant was found guilty on five counts for selling the single book, and received maximum penalty on each count of five years imprisonment and $5,000 fine, cumulated to a total of a $25,000 fine and 25 years imprisonment, five years longer than the sentence served by the last two Nazi war criminals to be released from Spandau Prison for the crime of genocide, the most infamous of all. The conviction was affirmed but returned to the trial court with the suggestion to reduce the harsh penalty. (United States v. West Coast News Company, March, 1966, 357 Fed.2d 855.) Aday was then resentenced to ten years imprisonment. A writ of certiorari on this case is now pending before the United States Supreme Court. This Court has read Sex Life of a Cop, a ribald parody on the moral hypocrisy of some members of the police department and certain public officials in a small town, including the chief of police, the mayor and a judge. There are related a long series of sexual episodes which are described with no more detail than the tamest of the nightstand type books, and completely lacks violence or deviant practices. In this Court's opinion, this book could not possibly be held to be obscene on the limits of candor test under California law[24] and appears to be com-

[24]This is another example of a trial judge who refuses to follow a previous decision of his own Supreme Court. See *Aday*

(This footnote is continued on the next page)

parable to a book called "The Sex Addicts" recently described and exculpated of obscenity by the Supreme Court of Illinois. (People v. Kimmel, decided September, 1966.)

10. United States v. Hamling, United States District Court for the Southern District of Texas, Houston Division criminal No. 65-H-172, a 26-count indictment was filed based on Federal obscenity statutes involving the following seven books: Orgy Club, Sin Summer, Shame Hunger, Temple of Shame, Virgins, Inc., Passion Carousel, and Swap Sect. Following a long trial, the jury was then unable to agree after nine days of deliberation and a mistrial was declared. At the present time a motion is pending to dismiss on constitutional grounds. At the conclusion of the trial, Judge Ingraham is reported in an editorial in the Houston-Chronicle, September 5, 1966, to have advised the prosecutors to "take a long, hard look" at the evidence before proceeding with a new trial. This trial lasted six weeks and

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v. Superior Court of Alameda County, 55 Adv. Cal. 796, 16 Cal. Rptr. 415 (May 11, 1961) and *California v. Aday et al.*, 226 Adv. Cal. App. 634, 38 Cal. Rptr. 199 (April 21, 1964), holding there was probable cause to believe "Sex Life of a Cop" obscene. Judge J. Irwin Shapiro did the same thing in *N. Y. v. Birch*, 40 Misc. 2d 626, 243 N.Y.S.2d 525 (1963), wherein Judge Shapiro held "College for Sinners" constitutionally protected, a book which had already been affirmed as outside the protection of the Constitution by the Appellate Division of the N.Y. Supreme Court, a decision which the New York Court of Appeals and the U.S. Supreme Court refused to review. CDL Commentaries on the Law of Obscenity, Vol. 1, No. 2, pages 1-9, 1-10, *N.Y. v. Fried*, 18 App.Div.2d 996, 238 N.Y.S.2d 742 (1963), appeal dismissed and certiorari denied 378 U.S. 578 (1964). We are convinced that had Judge Holland's decision been appealed, it would have been reversed by the California Supreme Court, as was Judge Shapiro's in the New York jurisdiction, *N. Y. v. Birch*, 269 N.Y.S.2d 752 (May 2, 1966).

cost the government an estimated $100,000 according to the editorial, which states in the final paragraph:

> "When society cannot arrive at a substantial agreement on obscenity—and we think the jury deadlock accurately reflects the broader view—then it is better to take no action at all."

From these few samplings of trial court decisions and jury verdicts it is at once strikingly obvious that of all the nightstand type books involved only a very few have been found obscene.[25] In the vast majority the books were found not obscene by the court or jury—or the jury could not agree.

This is then a report of a rather extensive survey made by the court with the help and cooperation of all counsel into the publicly accepted field of erotic literature. It was made, in the words of Judge Learned Hand in United States v. Kennerley, 209 Fed. 119 (1913) in an effort to determine "the average conscience of the time," and

> "the present critical point in the compromise between candor and shame at which the community may have arrived here and now."

From the array of evidence before the court, that "present critical point" is fixed and determined beyond a peradventure of a doubt "here and now" far outside of the orbit of the most salacious of the tepid and tasteless trash found in the nightstand type books.[26]

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[25]The trial judge was woefully uninformed. See CDL Commentaries on the Law of Obscenity, Vol. 1, No. 1, pages 17-23, CDL Commentaries, Vol. 1, No. 2, pages 3-1 through 3-12, and CDL Commentaries, Vol. 1, No. 3, pages 5-1 through 5-16, which demonstrates the complete unreliability of the deductive type of reasoning employed by the trial judge. See footnote 3.

[26]See footnotes 3 and 4. The trial judge's logic escapes us. He forgets the governmental reason for proscribing obscenity.

(This footnote is continued on the next page)

In the Ginzburg cases the Supreme Court now seems to have adopted a position long ago advocated by the Chief Justice in Roth-Alberts and reemphasized in his dissent in Jacobellis, 378 U.S. 203. This has been called the "sufficient evidence test" which seems to mean that if the material is commercially exploited for the sake of its prurient appeal to the exclusion of all other values *and there remains some doubt* that the material meets all three requirements of the constitutional definition of obscenity, then the trial court may accept the purveyor's evaluation at face value and the Supreme Court will not then reweigh the evidence. (Fanny Hill, 16 Law Ed.2d p. 7.) The same thought is again expressed in Ginzburg on Page 38 (16 Law Ed.2d) but on Page 40 the court seems further to define and limit the pandering rule by the following passage:

> "We perceive no threat to the First Amendment guarantees in thus holding that in *close cases* evidence of pandering *may* be probative with respect to the nature of the material." (Emphasis added.)

Thus it is clear that pandering alone will not sustain a conviction. There must be substantial evidence on all three aspects of the test before evidence of pandering can be added to swing the balance.

If he is correct, then it would be possible to show, from statistical analysis as to the number of persons who fornicate and the high position of some of those, that houses of prostitution must be acceptable to contemporary community standards. Are communities to be penalized when its law enforcement efforts in this area have in the past been strangulated by the penalizing nature of this Court's recent decisions, aimed at developing new rules in prior restraint cases—decisions which have stimulated the proliferation of such materials? We cannot believe that the law will tolerate this judge's valuation which would make the constitutional standard always a sinking one.

The 50 Mishkin books appear similar to the four in question with respect to titles, cover pictures, blurbs, and general content but the extent of detailed clinical description of sexual scenes is not clear. Only one of the Mishkin books has been submitted to this court, title "Swish Bottom," the contents of which are relatively bland and probably not representative of the other 49.[27] This book is price marketed in bold type at five dollars.

Mishkin's instructions to his authors (Page 62, 16 Law Ed.2d) are similar to letters of instructions from publisher to author here except for this saving grace:[28]

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[27]How can a judge make a differentiation as to material he has never seen? When he does, is prejudice indicated?

[28]We see neither distinction nor saving grace. cf. Mishkin's Instructions to his authors appearing at p. 11, fn. 7, 8 in CDL Brief Amicus Curiae in Mishkin Case. We would have thought the trial judge to have had his tongue in cheek had he printed the entire letter. It was:

> "We are currently starting a brand-new line of pocket-books, and we would like to see ideas and submissions from you.
>
> "The pocketbook picture has been changing by the month, as you know, and we need tough, strong, hard-hitting sex-action-filled books, geared to the demands of today's and tomorrow's highly competitive market—rather than to the standards of even a few months ago.
>
> "What we basically seek is off-beat sex, with emphasis on deviations such as lesbianism, sadism, masochism, fetichism, seance-a-trois, voyeurism, etc. The more off-beat the better. There is a demand for books about lesbians. (Male homo-sexuality, however, we tend to steer away from—in fic-tion.)
>
> "Plot is secondary. We do not want complicated plots, naive sex adventure stories, detective stories 'spiced' with sex—nor pages of rambling, pointless dialogue. What we need is detailed, vivid sex action, scenes every few pages, the more the better. Naturally the sex must be done in good taste by today's standards; we don't want four-letter words or *too* clinical descriptions. But within these limits it must be as strong—*and* as off-beat as possible.
>
> "Manuscripts for this new line should run 38,000—39,000 words. Our limit is 40,000. Not more."

(This footnote is continued on the next page)

"Naturally the sex must be done in good taste by today's standards; we don't want four-letter words or *too* clinical descriptions."

Obviously this publisher was attempting to comply with the obscenity laws as he understood them.

Mishkin did not operate on a national basis through regular commercial outlets. His operation was closer to that of the under-the-counter smut peddler,[29] as he sold only his own books through his own retail store except for an occasional sale to other outlets, all at contraband prices.

Finally, Mishkin holds (Page 62, 16 Law Ed.2d) that the prurient appeal test is satisfied if the material taken as a whole appeals to the prurient interest in sex members of a clearly defined deviant sexual group, referring in footnote eight to the American Handbook of Psychiatry.

Another of Zentner's letter to authors read:

"What we basically seek is off-beat sex, with emphasis on deviations. Some possible themes to write by: foot wear lined and rubber clothing, ultra high heels, whipping, gagging, female dominance, gloves, sex rituals, transvestia, sadism, masochism, homisexuality, phallic symbols, buttocks, inter-racial affairs (oriental, african, indian), boots and shoes, corsets and tight lacing, spanking, tying, girls fighting, wet clothing, masks, wife swapping, lesbianism, exotic lingerie, group orgies, voyeurism, aphrodisiacs, fettishes.

"Plot is secondary. We do not want complicated plots, naive sex adventure stories 'spiced' with sex—nor pages of rambling, pointless dialogue. I need more descriptions and more characters per book. Naturally, I expect the descriptions of these various things to be in good taste. The mere fact that some of these themes are used will sell our books."

[29]We do not read the Mishkin record as showing his business to be an under-the-counter operations which can be distinguished from Zentner's operations. Zentner's operations and criminal record place him in the same class as Mishkin. See CDL Commentaries on the Law of Obscenity, Vol. 1, No. 3, at pages 3-3 and 3-9.

This authoritative work names and describes ten major sexual perversions: overt homosexuality, pedophilia, fetishism, transvestimism, exhibitionism, voyeurism, sadomasochism, zoophilia, coprophilia, and necrophlia. "In defining perversion, however," says the author (Page 589) a distinction must be made between perverse acts and perversion as a psychopathological condition. A person whose primary mode of gratification is one of normal coitus might, nevertheless, derive some additional gratifications from acts that in themselves would be classified as perverse. As long as genital gratification in coitus is dominant, such a person would not be defined as a pervert."

While numerous perverse acts are related, few characters are to be found who are confirmed perverts, and they are usually lesbians. There are no male homosexuals. The acts are almost always foreplay to normal coitus Normal sex plays the predominant role. Sexual deviance is not advocated or condoned as a way of life. None of the books can be said to appeal predominantly as a whole to any single deviant group or combinations of groups such as the material designed for male homosexuals in the One, Inc. and MANual cases, supra.

These deviant incidents appeal to the average man's insatiable curiosity in sex in all its forms as may be inferred from the enormous sales volume in nightstand type books.

Moreover, Mishkin was convicted under the state obscenity statutes of New York which define obscenity in far broader terms than Section 311, Penal Code (Footnote 1, Page 58, 16 Law Ed.2d).

It is the conclusion of this court that the four books in question fall far short of satisfying the customary

limits of candor test applying contemporary standards. To be obscene the material must go substantially beyond these limits. Although the books were commercially exploited solely to appeal to prurient interest, that fact cannot overcome the fatal deficiency of this essential element. The books are, therefore, not obscene as a matter of law.[30]

In the words of Justice Harlan—society cannot condemn that which it tolerates.

The court wishes to thank all counsel for their assistance and friendly cooperation with the court and with each other in the presentation of this case, all in the highest tradition of the profession.

Thanks are also extended to Mr. Stanley Fleishman of the Hollywood Bar, an advocate preeminent in this confusing field, for furnishing the court information on the present status of several cases mentioned herein in which he is counsel, and for furnishing to the court some of the books discussed.

It is ordered that the motion of the defendants to dismiss the indictment on constitutional grounds be, and the same is, granted.

Dated: November 4, 1966.

Kenneth Holland
Judge of the Superior Court

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[30]We believe that a casual reading of this opinion demonstrates more succinctly than argument the great havoc that would result were the majority of this Court to abandon the basic principle of Roth (i.e., that the business of appealing to the prurient interest can be proscribed) in favor of the three criteria test employed in the California jurisdiction. We are understating our evaluation when we say that the dismissal herein was a complete miscarriage of justice.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ADAY ET AL. *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 149. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the Sixth Circuit is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

THE CHIEF JUSTICE and MR. JUSTICE BRENNAN would grant the petition, vacate the judgment, and remand in light of *Memoirs* v. *Massachusetts*, 383 U. S. 413.

MR. JUSTICE CLARK would grant the petition and affirm.

MR. JUSTICE HARLAN concurs in the reversal on the basis of the reasoning set forth in his opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478.